VP Nathan & Partners v Illangovan s/o Dorairaj A Suppiah and another motion

HIGH COURT (PULAU PINANG) — ORIGINATING MOTIONS NO 25–43 OF 2000 AND 25–44 OF 2000
KAMALANATHAN RATNAM J
31 OCTOBER 2001

Labour Law *— Employment — Resignation — Claimants was informed that employment prospects with firm and future increments would be affected negatively — Whether resignation of claimants voluntary — Whether resignation amounted to dismissal — Whether dismissal without just cause and excuse — Claimants gainfully employed immediately after termination, whether back wages should be awarded*

Labour Law *— Industrial Court — Award — Application to quash — Delayed-judgment, whether affected judge's mind with regard to demeanour and conduct of witnesses — Whether any illegality, irrationality or procedural impropriety in award*

Sometime in early April 1997, Kurnia Insurance Bhd ('Kurnia'), one of the applicant's main clients instructed the principle partner of the applicant, that Kurnia did not want both the claimants to handle any of their files. The aforesaid instruction was conveyed to another partner, Paul Manecksha, the managing partner of the applicant's firm in Penang ('the applicant's firm'). Paul Manecksha then verbally informed the claimants of the aforesaid instruction. Notwithstanding that, the claimants continued to attend to the Kurnia files. Upon discovering that the claimants were still handling their files, Kurnia was annoyed by the applicant's failure to comply with their instruction. The principal partner of the applicant then accordingly instructed Paul Manecksha to stop the claimants from handling any matters for Kurnia. Paul Manecksha subsequently had a meeting with the claimants. In the course of the meeting, both the claimants had inquired about the employment prospects in the applicant's firm, whereupon Paul Manecksha informed them that it would affect them in terms of future increments and bonuses. He also mentioned that the prospects of partnership were dim unless Kurnia reconsider its decision. The claimants then told Paul Manecksha, that if that was the situation, they might as well leave the firm and seek employment elsewhere. He then suggested to the claimants that they leave and the claimants accordingly left the applicant's firm. The claimants subsequently brought the matter before the Industrial Court and the Industrial Court ruled that the dismissal of the claimants were without just cause and excuse but denied reinstatements. The applicant then applied to this court by writ of certiorari to quash the award of the Industrial Court.

Held:

(1) The applicant had not shown any illegality, irrationality or procedural impropriety in the decision of the Industrial Court.

The theme of the applicant's attack was based only on criticisms of the award. This was a far cry from the strict requirement to quash an order of the Industrial Court (see p 349H–I).

(2) Not all delays in writing a judgment must be viewed as affecting the judge's mind with respect to demeanour and conduct of the witness, thus affecting their evidence and/or their credibility. Unless specific instances were shown in the delayed judgment whereby the decision-maker had expressly or impliedly relied on demeanor to arrive of his decision, delay per se, ought not to weigh against that judgment (see p 350D–E).

(3) The lack of candidness in the part of Paul Manecksha had clearly shown that the resignation was not voluntary. After all, since there were no complaints as to the conduct of the claimants and as there was sufficient work left for them to handle in the applicant's firm, the court could not but conclude that this was a clear case of the applicant's resignation not being voluntary. In the circumstances, the finding of the Industrial Court that the claimants were dismissed without just cause was a finding that this court agreed with (see pp 352F–G, I–353A).

(4) What weighed heavily against the applicant was the evidence of Paul Manecksha. He testified that he told the claimants that they could handle matters which were non-Kurnia matters. Not only was this not averred in the applicant's statement in reply, it also never appeared in the affidavit of Paul Manecksha in support of this application. That such a suggestion was even made to the claimants, was not even put to the claimants in cross-examination. Notwithstanding the accepted fact that in Industrial Court matters, the court does not stick to strict rules of evidence, surely such blatant omission could not be excused; more so when the applicant was attempting to rely on this statement. This omission alone drew the required adverse inference against the applicant (see p 353B–D).

(5) In the circumstances as there was clear evidence that both the claimants had been gainfully employed immediately after their termination, it was necessary, therefore for the court to quash the award of back wages and revert it back to the Industrial Court for a reassessment (see p 353H–I); *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529 followed.

[Bahasa Malaysia summary

Sekitar awal April 1997, Kurnia Insurance Bhd ('Kurnia'), salah seorang daripada pelanggan utama pemohon telah mengarahkan rakan kongsi utama pemohon, bahawa Kurnia tidak menghendaki kedua-dua pihak menuntut mengendalikan apa-apa fail mereka. Arahan seterusnya telah disampaikan kepada seorang rakan kongsi yang lain, Paul Manecksha, pengurus rakan kongsi firma pihak

menuntut di Pulau Pinang ('firma pihak menuntut'). Paul Manecksha kemudiannya telah secara lisan memberitahu kedua-dua pihak menuntut tentang arahan tersebut. Meskipun demikian, kedua-dua pihak menuntut masih mengendalikan fail Kurnia. Apabila mendapati bahawa kedua-dua pihak menuntut masih mengendalikan fail-fail mereka, Kurnia berasa sakit hati dengan kegagalan pemohon untuk mematuhi arahan mereka. Rakan kongsi utama pemohon kemudiannya dengan wajarnya telah mengarahkan Paul Manecksha memberhentikan kedua-dua pihak menuntut daripada mengendalikan apa-apa perkara untuk Kurnia. Paul Manecksha kemudiannya mengadakan mesyuarat dengan kedua-dua pihak menuntut. Semasa mesyuarat tersebut, kedua-dua pihak menuntut telah menanyakan tentang prospek pekerjaan dalam firma pemohon, di mana Paul Manecksha memberitahu mereka bahawa ia akan menjejaskan mereka dari segi kenaikan gaji dan bonus di masa hadapan. Beliau juga menyebutkan tentang prospek perkongsian amat tipis kecuali Kurnia mempertimbangkan semula keputusannya. Kedua-dua pihak menuntut kemudiannya memberitahu Paul Manecksha bahawa jika begitu keadaannya, mereka mungkin lebih baik meninggalkan firma tersebut dan mencari pekerjaan di tempat lain. Beliau kemudian mencadangkan kepada kedua-dua pihak menuntut agar mereka berhenti dan kedua-dua pihak menuntut dengan itu telah meninggalkan firma pemohon. Kedua-dua pihak menuntut kemudiannya telah membawa perkara tersebut di hadapan Mahkamah Perusahaan dan Mahkamah Perusahaan memutuskan bahawa pemecatan kedua-dua pihak menuntut adalah tanpa sebab yang adil tetapi tidak memberikan pengembalian kedudukan jawatan mereka. Pemohon sekarang memohon kepada mahkamah ini melalui writ certiorari untuk membatalkan award Mahkamah Perusahaan tersebut.

Diputuskan:

(1) Pemohon dalam kes ini tidak menunjukkan apa-apa kepenyalahan undang-undang, keadaan yang tidak rasional atau prosedur yang tidak betul dalam keputusan Mahkamah Perusahaan. Tema serangan pemohon adalah berdasarkan hanya pada kritikan-kritikan tentang award tersebut. Ini adalah jauh daripada keperluan ketat untuk membatalkan satu perintah Mahkamah Perusahaan (lihat ms 349H–I).

(2) Tidak semua kelewatan dalam menulis satu penghakiman mesti dikaji sebagai menjejaskan pemikiran hakim berhubung perilaku dan perbuatan saksi, yang oleh itu menjejaskan keterangan mereka dan/atau kebolehpercayaan mereka. Kecuali jika terdapat keadaan khusus yang ditunjukkan dalam penghakiman yang lewat di mana pembuat keputusan telah dengan nyata atau tersirat bergantung kepada perilaku untuk tiba kepada keputusan beliau, kelewatan per se, tidak sepatutnya dikira terhadap penghakiman tersebut (lihat ms 350D–E).

(3) Kekurangan sikap terus terang di pihak Paul Manecksha dengan jelas menunjukkan bahawa perletakan jawatan tersebut tidak secara sukarela. Lagipun, memandangkan tidak terdapat apa-apa aduan tentang perbuatan kedua-dua pihak menuntut dan terdapat kerja yang mencukupi untuk mereka kendalikan dalam firma pemohon, mahkamah hanya boleh membuat kesimpulan bahawa ini adalah satu kes yang jelas tentang perletakan jawatan kedua-dua pihak menuntut yang tidak secara sukarela. Dalam keadaan berikut, penemuan Mahkamah Perusahaan bahawa kedua-dua pihak menuntut dipecat tanpa sebab yang adil adalah satu penemuan yang mahkamah ini menyetujui (lihat ms 352F–G, I–353A).

(4) Apa yang menentang kes terhadap pemohon adalah keterangan Paul Manecksha. Beliau memberikan keterangan bahawa beliau telah memberitahu kedua-dua pihak menuntut bahawa mereka boleh mengendalikan perkara-perkara yang bukan perkara berhubung Kurnia. Bukan sahaja ini tidak ditegaskan dalan pernyataan jawapan pemohon, ia juga tidak terdapat dalam afidavit Paul Manecksha bagi menyokong permohonan ini. Bahawa cadangan begitu pernah dibuat kepada kedua-dua pihak menuntut tidak pernah dikemukakan kepada pemohon semasa pemeriksaan balas. Meskipun hakikatnya adalah bahawa dalam perkara-perkara berhubung Mahkamah Perusahaan, mahkamah tidak terikat dengan peraturan-peraturan ketat tentang keterangan, sudah tentu peninggalan yang terang-terangan begini tidak boleh dimaafkan; apa lagi apabila pemohon sedang cuba untuk bergantung kepada pernyataan ini. Peninggalan ini sahaja menimbulkan inferens bertentangan yang dikehendaki terhadap pemohon (lihat ms 353B–D).

(5) Dalam keadaan ini oleh kerana terdapat keterangan yang jelas bahawa kedua-dua pihak menuntut telahpun mendapat pekerjaan sejurus selepas pemecatan mereka, adalah perlu, dengan itu untuk mahkamah membatalkan award untuk gaji yang tertunggak dan mengembalikannya kepada Mahkamah Perusahaan untuk satu penilaian semula (lihat ms 353H–I); *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529 diikut.]

Notes

For a case on resignation, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 956.

For cases on award generally, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1178–1214.

Cases referred to

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh [2000] 3 MLJ 714 (refd)

A *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529 (folld)
Food Specialities (M) Sdn Bhd v En M Halim bin Manap @ Abd Manaf [1992] 2 ILR 311 (refd)
Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (refd)
B *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 (refd)
Mas Golden Boutique Sdn Bhd v Md Zain bin Abu [1999] 3 MLJ 201 (refd)
National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144 (refd)
C *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2000] 2 MLJ 272 (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

D *N Sivabalah* (*Shearn Delamore & Co*) for the applicant.
Pravin Kaur Jessy (*Jessy & Associates*) for the respondents.

Kamalanathan Ratnam J:

Preamble

E 25–43–2000

This is an application by a firm of solicitors by way of a writ of certiorari for an order to quash the award of the Industrial Court in Award No 453 of 2000, wherein Illangovan s/o Dorairaj A Suppiah, the first claimant, who was employed by the applicant and who, contending wrongful dismissal, F sought reinstatement or in lieu thereof, compensation. Having heard both counsel and their submissions, the Industrial Court ruled that the dismissal of the claimant was without just cause and excuse.

However, it denied reinstatement and made the following awards:

(i) Back wages from the date of dismissal to the last date of hearing G (31 July 1997 to 12 July 1999):

RM6,000 x 23 months and 11 days = RM140,200

(ii) Compensation in lieu of reinstatement. One month pay for every year of service (claimant joined the employment on 1 June 1990 for seven years):

H RM6,000 x 7 = RM42,000

(iii) Any other benefits (including bonuses) if any.

(iv) The amounts awarded to be paid to the claimants' solicitors within one month from the date of the award.

I 25–44–2000

This is another application by the same firm of solicitors by way of a writ of certiorari for an order to quash the award of the Industrial Court in Award

No 452 of 2000, wherein Subramaniam s/o Govindan Nair, the second claimant, who was employed by the applicant and who, contending wrongful dismissal, also sought reinstatement. Having heard the arguments and the submissions, the Industrial Court ruled that the dismissal was without just cause and excuse. However, it again denied reinstatement and made the following awards:

(i) Back wages from the date of dismissal to the last date of hearing (31 July 1997 to 12 July 1999):

RM6,000 x 23 months and 11 days = RM140,200

(ii) Compensation in lieu of reinstatement. One month pay for every year of service (claimant joined the employment on 1 June 1990 for seven years):

RM6,000 x 7 = RM42,000

(iii) Any other benefits (including bonuses) if any.

(iv) The amounts awarded to be paid to the claimant's solicitors within one month from the date of the award.

On the date fixed for hearing of both applications, parties requested that the cases be heard together. Subsequently, parties further agreed that since the facts of both cases were identical, this court could proceed with application No 25–43–2000, and that the parties in 25–44–2000 would be bound by the same decision since the same counsel were representing the parties in both the applications.

The first claimant, an advocate and solicitor of the High Court of Malaya, commenced employment with the applicant's branch in Penang on 1 June 1990 as a legal assistant with a starting salary of RM2,000. His duties and responsibilities were primarily in connection with road accident cases. The scope of the first claimant's duties and responsibilities were as follows:

(a) receiving instructions from the clients and applying for all necessary documentation from authorities, securing medical reports and specialist reports;

(b) interviewing all relevant persons in connection with the claim;

(c) corresponding with opposing solicitors and agreeing to documents;

(d) attending on clients to prepare defences or further conduct of the action;

(e) obtaining instructions from insurers to negotiate settlements or towards further conduct of the action;

(f) attending court to litigate the cases up to judgment, updating client and advising client of the outcome of the trial and merits of appeal; and

(g) preparing the memorandum of appeal in cases which are to be appealed and arguing the appeals and notifying the client of the outcome.

Sometime in early April 1997, Kurnia Insurance Bhd ('Kurnia'), one of the applicant's main clients, instructed the principle partner of the applicant in Kuala Lumpur, Dato' VP Nathan, that the said insurers did not want both the claimants to handle any of their files. They did not provide reasons for the said instruction. The aforesaid instruction was conveyed to another partner, Paul Manecksha by Dato' VP Nathan. Paul Manecksha was the managing partner of the applicant's firm in the Penang branch. Paul Manecksha then verbally informed the claimants of the aforesaid instruction. It is not in dispute that notwithstanding the above instruction, the claimants were allowed to continue to attend to Kurnia's files. Upon discovering that the claimants were still handling their files, Kurnia was annoyed by the applicant's failure to comply with their instructions. Dato' VP Nathan was accordingly instructed by Kurnia to preclude the claimants from handling any matters for Kurnia. Upon receiving the above mentioned instruction, Dato' VP Nathan again conveyed this message to Paul Manecksha.

Applicant's version thereafter

It is the applicant's case in both matters that having received the second instruction from Dato' VP Nathan, Paul Manecksha subsequently (on 14 April 1997) had a meeting with the claimant. In the course of the discussions, the claimants had inquired about their employment prospects in the applicant's firm. Paul Manecksha informed them that it would affect them in terms of their future increments and bonuses. He also mentioned that prospects of partnership were dim unless Kurnia reconsidered its decision. The claimants then told Paul Manecksha that if that was the situation, they might as well leave the firm and seek employment elsewhere. Paul Manecksha then informed the claimants that they need not leave immediately as they would have to provide the applicant with three months' notice of resignation. He then suggested that they leave on 31 July 1997. The claimants accordingly agreed to leave on 31 July 1997.

The applicant received letters from the claimants dated 31 July 1997 which were replied by Paul Manecksha, by his letters dated 5 August 1997. It is necessary to reproduce the same letters:

DS Ilangovan
No 20, Jalan Bukit Indah
Taman Bukit Indah
14000 Bukit Mertajam.

31 July 1997

M/s VP Nathan & Partners
95 China Street,
10200 Penang.

Attn: Mr PR Manecksha

Dear Sir,

Re: Request for Resignation

I refer to the conversation between Mr PR Manecksha and myself on 14 April 1997 on the above subject matter.

Mr PR Manecksha had asked for my resignation with effect from 31 July 1997. The reason for this was that the firm had taken a business decision that it was no longer economical to retain me and Mr G Subramaniam as legal assistants.

The above conversation took place in the presence of Mr G Subramaniam.

In light of the above I have no alternative but to act as per Mr PR Manecksha's instructions. Thus my last working day will be 31 July 1997.

Yours faithfully,

sgd
DS Illangovan

cc M/s VP Nathan & Partners
Advocates and Solicitors
Third Floor, No 15, Jalan Medan Tuanku Satu
Off Jalan Tuanku Abdul Rahman
50300 Kuala Lumpur

A similar letter was sent to the second claimant in 25–44–2000.

VP Nathan & Partners
95, China Street,
10200 Penang, Malaysia.

VPN/PRM/Misc DS

15 August 1997

Mr DS Illangovan
No 20, Jalan Bukit Indah
Taman Bukit Indah
14000 Bukit Mertajam
Kedah Darul Aman

AR REGISTERED

Dear Sir,

Re: Your Resignation

Thank you for your letter dated 31 July 1997 and we wish to put the record straight.

Our Mr Manecksha informed you that we had received instructions from our main client that they did not want you to handle any of their work. Under those circumstances you agreed to resign by 31 July 1997.

Yours faithfully,

sgd VP Nathan

A similar letter was sent by the applicant to the claimant in 25–44–2000. The applicant contends that the decision of the Industrial Court is wrong both in fact and in law and seeks to quash the award. The applicant's attack is launched on two grounds:

(1) that there was no dismissal of the claimants but that they resigned of their own accord;

(2) the award of back wages ought to be set aside.

Functions of the High Court in certiorari applications

The function of the High Court in judicial review actions such as certiorari is supervisory and not appellate. The Court of Appeal in the recent case of *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600, held that it is not open for a court in judicial review proceedings to exercise appellate powers. If a judge to whom an application is made for an order for certiorari enquires into and disturbs the findings of facts based on the credibility of witnesses, he is actually exercising appellate functions. Therefore, the court held that it must be concluded that the finding of perversity is merely a guise for interfering with findings that are only capable of being corrected in the exercise of appellate jurisdiction. Yet, in another recent decision the Court of Appeal in *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714, held that findings of facts based on credibility of witnesses, as well as its decision to prefer the evidence of one party over another, was outside the High Court's judicial review jurisdiction, and the court was bound to accept such findings of the Industrial Court. It is trite law that a High Court judge is bound to follow and be guided by the principles set out by its superior courts. Yet again in *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144, the Court of Appeal held that:

> It was wrong for the High Court in a supervisory role to substitute its findings of fact when such role was within the province of the Industrial Court.

Yet again in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2000] 2 MLJ 272, the Court of Appeal took the issue of findings of facts of the Industrial Court even a step further when it said at p 248 as follows:

> He has submitted, quite rightly, that once the Industrial Court made an evaluation rightly or wrongly and had arrived at a finding of fact, that finding was immunised from judicial review (see *The State Of Madras v G Sundaram* AIR 1965 SC 1103; *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585).

To my mind, the function of the High Court has been very clearly defined by these decisions of the Court of Appeal. However, the decision of KC Vohrah J (as he then was) in *Mas Golden Boutique Sdn Bhd v Md Zain bin Abu* [1999] 3 MLJ 201 needs mention. His Lordship said at p 208 as follows:

> Issues of facts are for the Industrial Court to decide and it is not open to the High Court to review findings of facts unless the material before the court shows illegality, irrationality or procedural impropriety in the decision.

I find that the applicant in this case has not shown any illegality, irrationally or procedural impropriety in the decision of the Industrial Court. The theme of the applicants' attack is based only on criticisms of the award. This is a far cry from the strict requirement to quash an order of the Industrial Court. The applicant also attacked the learned chairman's observation of the witnesses in arriving at his decision by submitting that having delivered

his award a year later, there was no way he could relate to the observations made of the witnesses.

Whilst I agree that a year's delay could cloud an immediate impression that had been formed upon the mind of a judge of the demeanour and conduct of a witness, it is clear to me that when the learned chairman said in his award at p 12 '… and further having seen and heard both COW–1 (Paul Manecksha) and the claimant, leads this court to believe the claimant's evidence that he was told to tender his resignation from the firm with effect from 31 July 1997, and that he did so as required of him', he was in fact persuaded by the evidence adduced, more than having to rely on demeanour, because earlier in his judgment at p 10, he affirmed this view that I have formed, when he said 'to determine whether the claimant voluntarily resigned or was forced into resigning, the conduct of the firm and its representative is material to this issue. The conduct of COW–1 and his verbal communication to the claimant must be examined in the context of the circumstances. This must be viewed together with the conduct of the claimant in response to those circumstances.'

It is important for me to appreciate that not all delays in writing a judgment must be viewed as affecting the judge's mind with respect to demeanour and conduct of witnesses, thus affecting their evidence and/or their credibility. Unless specific instances are shown in the delayed judgment whereby the decision maker had expressly or impliedly relied on demeanour to arrive at his decision, delay per se to my mind, ought not to weigh against that judgment.

The function of the Industrial Court

The function of the Industrial Court has been very clearly laid out by the Federal Court in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129. Raja Azlan Shah CJ (as His Highness then was) said at p 136 as follows:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.

Findings of the court

It is the contention of the applicant that the claimants had resigned voluntarily, whereas, the claimants contend that they were forced into resigning and that therefore this could not be construed as voluntary resignation, but as dismissals.

In a very well written judgment, the chairman set the case of the parties very succinctly when he said at p 9 as follows:

> The firm contends that the claimant resigned voluntarily, whereas the claimant contends that he was forced into resigning and therefore not a voluntary resignation but a dismissal. That being the case, the firm's case is that it did not dismiss the claimant. Therefore, it did not adduce any evidence to justify the dismissal (if any) as being with just cause or excuse if in fact the cessation of employment of the claimant is found to be a dismissal rather than a voluntary resignation. Thus, it is now necessary only to determine whether in effect there was a dismissal of the claimant in the circumstances, and if so, the claimant succeeds in establishing that the dismissal was without just cause or excuse.

The chairman then quite correctly relied on the decision of *Food Specialities (M) Sdn Bhd v En M Halim bin Manap @ Abd Manaf* [1992] 2 ILR 311, which held that the burden on a case where there is a resignation is on the employee to prove that he was forced into resignation and that it was not a voluntary act.

Mr Sivabalah, for the applicant, in summarizing the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 argued that a decision of the Industrial Court is liable to be quashed by way of an order of certiorari if:

(i) it took irrelevant matters into consideration;

(ii) it failed to take into account relevant matters into consideration;

(iii) its decision was perverse or unreasonable;

(iv) it acted on an incorrect basis of fact;

(v) it acted on no evidence.

Since these principles have received the final stamp of authority of the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369, I am bound by these set principles.

It is therefore incumbent upon this court to scrutinize the judgment of the learned chairman to see if he had committed any of the errors of omission or commission as laid down in the above referred two cases.

I must also bear in mind the correct decision of the chairman that the burden was on the claimants to show that the resignation was not voluntary. Paul Manecksha told the claimant at a discussion on 14 April 1997 to seek alternative employment after telling them that Kurnia did not want them to handle their files. He then told the claimants that a termination letter coming from the applicant would 'look bad' and asked the claimants to tender their resignation. The claimants also told the court that towards the end of April 1997 he was called by Paul Manecksha and asked for the letter of resignation. Paul Manecksha, in his examination in chief, denied that he had told the claimants to leave or resign but he admitted that in answer to questions from the claimants during the discussion on 14 April 1997, he had told the claimants that his future increments in the firm may be affected and that prospects of partnership in the firm 'did not appear very good'. In his statement in reply, the applicant pleaded that at the meeting on 14 April 1997, the claimant was advised that his 'career advancement and above all, his ability to continue in his chosen field as an advocate and solicitor' would

be materially affected because of Kurnia's instruction not to let them handle any of their files as Kurnia's files 'accounted for an overwhelming proportion of the firms's work.' It is necessary to relate these facts to delve into the issue of voluntary or forced resignation. To my mind, the plea of the applicant that it had to bow to the whims of Kurnia because of its 'overwhelming proportion' of files would give the impression that almost the entire or at least the bulk of the applicant's work was from this insurer. As the evidence unfolded, this was indeed an untrue statement. As found by the learned chairman, evidence led showed that only 50% of the cases came from Kurnia whilst the rest were from other insurance companies. I have now to consider this untrue material statement that formed the basis of the applicant's dismissal of the claimants with the applicant's glowing appraisal of the claimant's conduct and work as an advocate and solicitor. Evidence was led that Paul Manecksha was also upset just as the claimants were when the claimants were told the second time that they were not to handle Kurnia's files. Paul Manecksha was upset because he had worked closely with the claimants for many years. Paul Manecksha further stated in evidence that if the claimants had not resigned, the applicant would not have terminated their services as there were enough non-Kurnia files for them to handle. To my mind, herein lies the answer to this question of forced or voluntary resignation, if Paul Manecksha had such generous thoughts towards the claimants, this court wonders why he did not tell the claimants this when the claimants allegedly told him that since their prospects of increment and partnership would be affected they might as well resign and look for a job elsewhere. Evidence was led that the claimants had worked for seven years for the applicant and that there were no complaints with regards to the claimants' work. Why then did Paul Manecksha not tell the applicant that they could handle the rest of the files? Surely it is a matter of directing the other solicitors in the firm who have not been rejected by Kurnia to handle Kurnia's files and for these two claimants to take over the rest of the files. The remaining 50% of the applicant's work which came from other insurance companies had to be attended to also. This lack of candidness on the part of Paul Manecksha has clearly shown that the resignation was not voluntary. After all, since there were no complaints as to the conduct of the claimants and as there was sufficient work still left for them to handle in the applicant's firm, I cannot but conclude that this was a clear case of the applicant's resignation not being voluntary.

Another astounding feature of this case is that in spite of their vociferous protestations against the claimants' handling their cases and which required two calls from Dato' VP Nathan to Paul Manecksha, and with Paul Manecksha having two such meetings with the claimants, yet from 14 April 1997 to 31 April 1997, the first claimant was allowed to handle 47 Kurnia files and 72 non-Kurnia files, and that Subramaniam (the second claimant in 25–44–2000), 54 Kurnia files and 65 non-Kurnia files. Why did Kurnia allow this if they totally disliked the claimants from handling their files? These questions had not been addressed by the applicant either in its evidence or in its submission. I am therefore satisfied that the resignation was not voluntary. In the circumstances, the finding of

the learned chairman that the claimants were dismissed without just cause is a finding that this court absolutely agrees with.

It is to be noted that as late as in December 1996, the first claimant received an increment of RM1,000 as he did the previous year and the evidence of the claimant was that he gathered the impression, that Paul Manecksha regarded him highly.

To my mind, what weighs heavily against the applicant is the evidence of Paul Manecksha. He testified that he told the claimants that they could handle matters which were non-Kurnia matters. Not only was this generous offer not averred in the applicant's statement in reply, it also never appeared in the affidavit of Paul Manecksha filed in support of this application. That such a suggestion was even made to the claimants, was not even put to the claimants in cross examination.

Notwithstanding the accepted fact that in Industrial Court matters, the court does not stick to strict rules of evidence, surely such a blatant omission to put one's own case to the claimants during cross examination cannot be excused, more so when the applicant itself is attempting to rely on this statement. This omission alone must draw the required adverse inference against the applicant that such a suggestion that the claimants could do non-Kurnia matters was never made to them. Since Paul Manecksha has testified that he did make that offer, therefore obviously, the claimants could have been retained to do the non-Kurnia files. On this ground too I am compelled to agree with the finding of the learned chairman that the claimants' resignations were not voluntarily made.

Back wages

The learned chairman awarded backwages from the date of dismissal to the next date of hearing, ie from 31 July 1997 to 12 July 1999 at RM6,000 per month for 23 months and 11 days, amounting to RM140,200. This award is attacked on the basis that the claimant in 25–44–00 was gainfully employed on his own admission as of 1 August 1997 with the firm of Ganesan & Co at a reduced salary of RM4,500, whereas the first claimant, after leaving the applicant, opened his own firm on 13 August 1997. On 30 June 1998, he dissolved the firm and joined a firm called Shariful Sabaria also as a partner. He left the partnership on 30 June 1999 and started his own firm of Ilango & Co as of 1 July 1999.

On this issue of back wages, I need to only refer to the latest authority. In *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529, the Federal Court held that in line with equity and good conscience, when assessing the quantum of back wages, the Industrial Court should, if established by evidence or by admission, take into account the fact that the claimant has been gainfully employed elsewhere after his dismissal and that the failure to do so constitutes a jurisdictional error of law. In the circumstances, as there is clear evidence that both the claimants had been gainfully employed immediately after their termination, albeit at a reduced salary, it is necessary, therefore, for me to quash the award of back wages and to revert it back to the learned chairman for a reassessment. Since each

party succeeded on one issue each, I ordered each party to bear its own costs.

Order accordingly.

Reported by Peter Ling